BERNICE SINGER

v.

MAXWELL BERGHOUSE

HIGH COURT, AUSTRALIA
MASON CJ, DEANE, TOOHEY, GAUDRON & McHUGH JJ
[F.C. 94/035]
14 SEPTEMBER 1994

PROBATE & ADMINISTRATION: *Succession - Wills - Construction of provision of will - Whether ante-nuptial agreement relevant in construing the words of the will - Whether testator's wife provided out of the estate for her maintenance education or advancement in life - Whether any such provision inadequate - Sections 7 & 9 Family Provision Act 1992 (NSW).*

CIVIL PROCEDURE*: Whether finding of lower Court on discretionary principle - Whether appellate Court may review decision - Evaluative determination of primary decision makers.*

The appellant and the deceased married on 7 April 1987. An ante-nuptial deed was executed by both of them which provided that each party with the accord of the other, holds his or her assets for his or her own use or disposition and it be testamentarily held for the benefit of their respective children or other members of their separate families. Each party covenanted not to make any claim on those assets and not to impede the other from dealing with or disposing of those assets.

The deceased had made a will on 31 July 1987, wherein he left his estate to the respondent as executor on trust for sale and to hold the proceeds upon trust to pay his just debts, funeral and testamentary expenses and all duties and the balance of his assets to be passed to his son. The effect of the will was that the whole estate valued at $454,156 passed to the son.

The appellant applied under s. 7 of the Family Provision Act 1972 for an order making provision out of the estate for her maintenance, education and advancement in life. The Master refused her application on the grounds that the appellant had her own assets and financial resources, that the ante-nuptial agreement prevented the appellant from having expectations of a more affluent life upon marriage and that the deceased had not failed in a moral obligation to make proper provision for her maintenance and advancement.

The Court of Appeal agreed with the Master and refused to interfere with the decision, on the ground that it was discretationary. On appeal to the High Court, the appellant argued that the facts showed a manifest failure of testamentary duty to the appellant; that the deed should not have been considered and had no weight as it was only a wish that the parties' children should inherit respective family homes and that the estate was sufficient to enable provision for the appellant without affecting the son's claims under the will.

Held:

Mason CJ, Deane and McHugh JJ:

[1] The ante-nuptial agreement was admissible to show that the parties thought its terms fair at the time they signed it. The appellant could not say that she had expectations of a more affluent life, than she led before her marriage, upon her husband's death. The agreement is also admissible to show all the relevant circumstances which the Court must take

into account when determining whether the deceased made inadequate provision for the proper maintenance and support of the appellant. The brevity of the marriage and the significant financial contribution made by the deceased to their joint maintenance and the lack of evidence of contributions made by the appellant showed that the agreement had significance.

[2] The Court must determine whether the appellant has been left without adequate provision for his of her proper maintenance, education and advancement in life. It is a question of objective fact to be determined at the date of the hearing. Unless appellate Courts show restraint in disturbing the evaluative determination of primary decision - makers they will inevitably invite appeals to a different evaluation which, objectively speaking, may be no better than the first.

[3] In this case, paying careful regard to the need to take due account of contributions which are not directly productive of a monetary return, the conclusion that the appellant was able to lead a perfectly satisfactory life comfortable in her own home with secure income backed by a large capital sum was rightly made by the Master. No need for maintenance has been shown for anything now or likely to be required in the future which would not easily be covered by the appellant's own resources.

Toohey and Gaudron JJ:

[1] The structure and contents of the Act do not point to the exercise of a merely discretionary judgment. The Court must be satisfied that the provision made is inadequate for the proper maintenance, education and advancement in life of the eligible person. If no adequate provision had been made, the Court is empowered to make an order in favour of that person. The terms of the order it makes is not so much the exercise of a discretion as an assessment of what is required, in all the circumstances, to make that provision.

[2] It could not be said that the testator who was able to make provision but made no provision at all for his wife had met obligations imposed by the Act, particularly when provision for the wife could have been made without affecting the obligation to provide for his son.

[3] The gift of the testator to the son constituted adequate provision and therefore $50,000 from the disposable assets is reasonable provision for the appellant.

[Appeal dismissed with costs]

Cases referred to:

Hughes v. National Trustees, Executors and Agency Co. of Australasia Ltd. [1979] 143 CLR 134 ***(refd)***
White v. Barron [1980] 144 CLR 431 ***(refd)***
Bondelmonte v. Blanckensee [1989] WAR 305 ***(refd)***
Golosky v. Golosky, unreported, NSW Court of Appeal ***(refd)***
In re Allen (Deceased), Allen v. Manchester [1921] 41 NZLR 218 ***(refd)***
Bosch v. Perpetual Trustee Co. [1938] AC 463 ***(refd)***
Worladge v Doodridge [1957] 97 CLR 1 p. 11 ***(refd)***
Goodman v. Windeyer [1980] 144 CLR 490 at 497 ***(refd)***
Goodman v. Windeyer [1980] 144 CLR at 509 ***(refd)***
Hunter v. Hunter [1987] 8 NSWLR 573 ***(refd)***
Pontifical Society for the Propagation of the Faith v. Scale [1962] 107 CLR 9 ***(refd)***
Hughes v. National Trustees, Executors and Agency Co. of Australasia Ltd. [1979] 143 CLR ***(refd)***
White v. Barron [1980] 144 CLR p. 442 ***(refd)***
Re Fulop Deceased [1987] 8 NSWLR 679 ***(refd)***

House v. The King [1936] 55 CLR 499 ***(refd)***
*Good man v. Windeyer [1980] 144 CLR p. 501****(refd)***
*Hunter v. Hunter [1987] 8 NSWLR p. 576****(refd)***
*White v. Barron [1980] 144 CLR p. 435****(refd)***
Mallet v. Mallet [1984] 156 CLR 605 ***(refd)***
Hughes v. National Trustees, Executors and Agency co. of Australasia Ltd. [1979] 143 CLR 134 ***(refd)***
*Agency Co. Ltd. [1956] 95 CLR 494****(refd)***
*McCosker v. McCosker [1957] 97 CLR 566****(refd)***
*Pontifical Society for the Propagation of the Faith v. Scales [1962] 107 CLR 9****(refd)***
*Ellis v. Leeder [1951] 82 CLR 645****(refd)***
*Allen v. Manchester [1922] 41 NZLR 218 p. 220****(refd)***
*Bosch v. Perpetual Trustee Co. Ltd [1938] AC 463 p. 479****(refd)***
*Goodman v. Windeyer [1980] 144 CLR 490 p. 497****(refd)***
*Re Fulop [1987] 8 NSWLR 679****(refd)***
*Hunter v. Hunter [1987] 8 NSWLR 573****(refd)***
White v. Barron [1980] 144 CLR 431 pp. 434-435 ***(refd)***
Goodman v. Windeyer [1980] 144 CLR 490 p. 509 ***(refd)***
*Hunter v. Hunter [1987] 8 NSWLR p. 576****(refd)***
O'Sullivan v. Farrer [1989] 168 CLR 210 ***(refd)***
*Bosch v. Perpetual Trustees Co. [1938] AC 463 p. 476****(refd)***
White v. Barron [1980] 144 CLR p. 449 ***(refd)***
*Goodman v. Windeyer [1980] 144 CLR p. 509****(refd)***

Legislation referred to:
Family Provision Act 1982 (NSW), ss. 6 (1) (a) (b) (c) (d), 7, 9 (1) (2) (3) (a), 32(2), 33(1)

Other sources referred to:
For Richer For Poorer; Money, Marriage and Property Rights, [1984], Scutt & Graham, Ch. 3
Women and the Law, [1990], Scutt, Ch.3
The Hidden Gender of Law, [1990], Graycar and Morgan, Ch. 5
Counting for Nothing: What Men Value and What Women are Worth, [1988], Warning
Equality Before the Law: **Justice for Women**, [1994] Australian Law Reform Commission, Report No.69, Pt 1, at 11-13

For the appellant - Theodore Freilich
For the respondent - Maxwell Berghouse & Ives

JUDGMENT

Mason CJ, Deane & McHugh JJ:

This is an appeal from a decision of the New South Wales Court of Appeal (Sheller JA, with whom Cripps JA agreed; Kirby P dissenting) dismissing an appeal by the appellant from a decision of Master Windeyer dismissing the appellant's application for an order under s. 7 of the Family Provision Act 1982 (NSW) ("the Act"). The relevant facts have been stated in the reasons for judgment prepared by Sheller JA in the Court of Appeal. The summary which follows is taken from his Honour's reasons.

The appellant, who was born on 18 June 1929, is the widow of the deceased Lionel Singer who died on 9 March 1988 aged 67. They were married in New York on 7 April 1987. The deceased left a will dated 31 July 1987, probate of which was granted to the respondent Maxwell Berghouse. By this will the deceased gave the whole of his estate to his executor upon trust for sale and thereafter to hold the proceeds upon certain trusts. The effect of

a these trusts, after payment of debts and other expenses, was that proceeds from property acquired before the deceased's marriage went to the deceased's son Joseph Singer, and proceeds of property acquired after the marriage were to go to the appellant for life and thereafter to the son absolutely. By cl.3 of the will the deceased provides:

> I direct my executor to bind himself to the terms of a Deed of Ante Nuptial Settlement made on 9 March 1987 between myself and my dear wife and I further declare I
b have no further interest in the ante nuptial estate of my dear wife.

The recitals to that deed contained acknowledgements by the deceased and the appellant that each desired his or her assets at the date of execution to be for such use or disposition as he or she should desire and should testamentarily be held for the benefit of the party's children descendants or other members of the family respectively as the party might appoint.
c The deed contained mutual covenants in like terms by each party foregoing claims against the other's estate. Clauses 3 and 4 contained the covenants on the part of the appellant. Clause 5 contained a provision applicable to the covenants. Clauses 3-5 (inclusive) were as follows:

> 3. Bernice has not and will not at any time in the future have and/or make any claim under the provisions of any legislative enactment of the State of New York, of the United States
d of America, of the State of New South Wales or of the Commonwealth of Australia or under any provision of the Common Law of the said States and Countries with respect to provisions for entitlement to property arising out of the marriage relationship, whether in its subsistence or beyond and/or arising out of testamentary capacity or intestacy, to any of the assets presently owned by Lionel or to any assets into which these present assets may be converted by or on behalf of Lionel.
>
e 4. Bernice further covenants that she will not at any time take any action which may prevent or hinder or impede Lionel from dealing with or disposing of his aforesaid assets.
>
> 5. These agreements and covenants herein may be pleaded in bar to any claim, by Bernice and/or Lionel made contrary to such agreements and covenants, wheresoever and within the jurisdiction of whichever Court such claim is made.

f The Master concluded, rightly in our view, that the effect of the deed was to provide that neither party would make any claim against the estate of the other as it stood at the date of execution, or to any assets into which those assets may have been converted. The Master also concluded, again rightly in our view, that the provisions of the deceased's will were intended to give effect to the agreement embodied in the deed.

The net value of the estate on the date of death was $454,755. The estate included a house
g property at 55 Beaumont Street Rose Bay, Sydney, valued at $275,000. The balance of the estate consisted mainly of the proceeds of life insurance policies. It was common ground that, in the events which have happened, the whole of the estate passed under the will to the deceased's son Joseph. At the date of the hearing before the Master the net value of the estate was in the order of $556,000. It was asserted that the widow departed from Australia after the death of the deceased with $8,480 belonging to the estate but the respondent
h does not require that this amount be repaid. After deducting this amount and the value of the Rose Bay property, the residue of the estate amounted to $180,000 approximately. This was reduced by the costs of the hearing before the Master to $135,000 approximately. Since then, additional expenses, including the costs of the litigation, advances to and reimbursement of expenses incurred by Joseph Singer in connection with the property, particularly the restoration of the property, appear to have almost dissipated the residue of the estate, leav-
i ing a mortgage to secure the sum of $30,000 on the property.

The relationship between the appellant and the deceased

The parties do not contest the findings made by the Master as to the history and circumstances of the relationship between the appellant and the deceased. The parties, each having been previously married, met in 1986 and became fond of each other. The deceased had been a member of the Consumer Claims Tribunal. In 1982 he had been retired from that office and in 1986 he received $250,000 compensation for loss of office. The appellant had been living in Brooklyn, New York, where she had part-time employment which she gave up on marriage. The appellant and the deceased stayed in the appellant's house in New York for a short time after their marriage, returned to Sydney and remained there from May until September 1987 and then spent from September to December of that year in the United States. They came to Sydney some months before the deceased's death and remained there. The appellant contributed to their expenses while travelling.

They did not intend to live in the deceased's property. They lived in a property for which the deceased paid the rent. They contemplated purchasing a house, probably as joint tenants. Although the deceased was not in good health during the marriage, his death was unexpected.

The appellant returned to New York after the deceased's death. She no longer worked and the Master considered that she would not work in the future. Her health was not good. She owns a house in Brooklyn worth about $230,000. The house is divided into two apartments in one of which she lives. The other is let to her daughter at a rent of $460 per month, the proper rental being about $630 per month. It seems that at age 62 she became entitled to a pension of $370 per month which increased to $460 per month when she turned 65. She had $320,000 in bank deposits. The evidence did not reveal what her income from these investments was.

The son's circumstances

Joseph was 44 at the date of the hearing before the Master. He seems not to have had a settled occupation. Business ventures in which he participated were not successful and he was virtually penniless by the end of 1983. He went to the United States in 1983 and returned home in 1985. After his mother died in that year, he looked after the deceased. He went overseas with the deceased in 1986. When they returned home in 1986 the Rose Bay property had been badly damaged by a storm and was not habitable. Since the deceased's death, Joseph has done much work on the house, work that had been planned before the deceased's death. Joseph has spent some of his own money on the work but has been largely reimbursed by the estate. He married in 1987. His wife did part-time work earning approximately $200 per week. Joseph had no assets apart from a motor vehicle worth $10,000. He worked as a salesman. His income in the year ended 30 June 1989 was $13,653. The deceased intended that his son would live in the Rose Bay property.

The case for the appellant

The appellant submits that the facts show a manifest failure of testamentary duty on the part of the deceased to the appellant. The appellant further submits that, in so far as the Master took cognisance of the provisions of the ante-nuptial deed, the Master's exercise of discretion was vitiated by an error of law and of principle. The appellant also contends that the ante-nuptial deed had no weight because it had receded in significance into no more than a wish that the parties' children should inherit the respective family homes and because the financial position of the estate was sufficient to enable provision to be made for the appellant without affecting Joseph's claim to the Rose Bay property.

The significance of the ante-nuptial agreement

It is convenient to examine at the outset the significance of the ante-nuptial agreement. The Master dealt with it briefly. He noted that the appellant and the deceased had consulted Mr Berghouse who had given the deceased a draft agreement but had suggested that it should be checked by a New York Lawyer. The appellant took it to her own attorney who said that he did not know why it was needed but explained it to her. The Master found that she understood it. He noted that the final agreement was not the document prepared by Mr. Berghouse. That agreement was re-executed in Sydney. The Master went on to say:

> The strange provisions of the will are clearly intended to give effect to the agreement and although the agreement does not prevent this claim from being brought it is admissible under s. 9(3)(c) and (d) of the Family Provision Act although no doubt it might not have been admissible and would be held to have been irrelevant had the marriage lasted for a reasonably long period of time.

In the Court of Appeal, Sheller JA observed that s. 31 of the Act enables a person to release his or her rights to make an application under the Act in relation to the estate of a deceased person, but that, in order to be effective, a release requires the approval of the Court. No such approval was sought in the present case. Sheller JA went on to say that:

> The Master considered that the real relevance of the agreement was to show that the parties thought its terms fair at the time they signed it. In the event of her husband's death the appellant could not say that she had expectations of a more affluent life than she had led before the marriage. For my part, I do not regard it as having, in the circumstances of this case, any greater significance in determining whether an order and if so what order should be made in favour of the appellant.

In our view, Sheller JA was correct in approaching the matter in this way. The agreement was admissible for the limited purpose indicated in the passage quoted above. Its admissibility is consistent with s. 32(2) which makes admissible statements by a deceased of any fact of which direct oral evidence by a deceased would, if he or she were able to give that evidence, be admissible. The deed was admissible because the Court must take all the relevant circumstances into account when determining whether a deceased made inadequate provision for the proper maintenance and support of an eligible person (*Hughes v. National Trustees, Executors and Agency Co. of Australasia Ltd.* [1979] 143 CLR 134 at 147-148). Obviously, there can be cases under the Act in which the existence of such an agreement will have little or no real significance by reason of either the circumstances in which the agreement was made or events occurring during the course of the marriage or relationship. However, given the brevity of the marriage, and the significant financial contributions made by the deceased to the maintenance of both the appellant and the deceased together with the lack of any detailed evidence of either financial or non-financial contributions by the appellant, we do not believe that this is such a case. It should also be mentioned that the appellant did not deny that she and the deceased intended that their own real estate properties should go to their own children. Accordingly, the attack on the Master's use of the ante-nuptial agreement fails.

The jurisdiction of the Court

Section 7 of the Act provides that, subject to s. 9, if the Court is satisfied that the person applying for provision is an eligible person (See s. 6(1)), it may:

> order that such provision be made out of the estate... of the deceased person as, in the opinion of the Court, ought, having regard to the circumstances at the time the order is made, to be made for the maintenance, education or advancement in life of the eligible person.

Section 9(2) provides that the Court shall not make an order under s. 7 unless it is satisfied that:

> (a) the provision (if any) made in favour of the eligible person by the deceased person either during his lifetime or out of his estate;
>
> ...
>
> is, at the time the Court is determining whether or not to make such an order, inadequate for the proper maintenance, education and (Compare the conjunctive in s. 9(2)(a) with the disjunctive in s. 7. The difference is not significant.) advancement in life of the eligible person.

It is clear that, under these provisions, the Court is required to carry out a two-stage process. The first stage calls for a determination of whether the applicant has been left without adequate provision for his or her proper maintenance, education and advancement in life. The second stage, which only arises if that determination be made in favour of the applicant, requires the Court to decide what provision ought to be made out the deceased's estate for the applicant. The first stage has been described as the "jurisdictional question"(See, e.g. *White v. Barron* [1980] 144 CLR 431 at 456; *Bondelmonte v. Blanckensee* [1989] WAR 305 at 307; *Golosky v. Golosky*, unreported, New South Wales Court of Appeal, 5 October 1993). That description means no more than that the Court's power to make an order in favour of an applicant under s. 7 is conditioned upon the Court being satisfied of the state of affairs predicated in s. 9(2)(a).

The Act draws a distinction between two classes of eligible person. Thus, where the applicant is an eligible person by virtue of s. 6(1)(c) and (d), that is, a former spouse, a dependent grandchild or a dependent member of the deceased's household, the Court must determine first whether there are factors which warrant the making of an application. This initial inquiry is irrelevant when the applicant is an eligible person under s. 6(1) (a) or (b), that is, where the applicant is a widow as here, a widower, a *bona fide* domestic partner of the deceased, or a child of the deceased.

In Australia, it has been accepted that the correct approach to be taken by a Court invested with jurisdiction under legislation of which the Act is an example was that stated by Salmond J in *In re Allen (Deceased), Allen v. Manchester* ([1921] 41 NZLR 218). In that case his Honour said (ibid. at 220-221; appvd in *Bosch v. Perpetual Trustee Co.* [1938] AC 463 at 479; appld in *Worladge v Doodridge* (1957) 97 CLR 1 at 11; *Goodman v. Windeyer* [1980] 144 CLR 490 at 497):

> The provision which the Court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances.

For our part, we doubt that this statement provides useful assistance in elucidating the statutory provisions. Indeed, references to "moral duty or "moral obligation" may well be understood as amounting to a gloss on the statutory language *(Hughes v. National Trustees, Executors and Agency Co. of Australasia Ltd.* [1979] 143 CLR at 158; *Goodman v. Windeyer* [1980] 144 CLR at 504-505).

The first question is, was the provision (if any) made for the applicant "inadequate for [his or her] proper maintenance, education and advancement in life"? The difference between "adequate" and "proper" and the interrelationship which exists between "adequate provision" and "proper maintenance" etc. were explained in *Bosch v. Perpetual Trustee Co.* ([1938] AC at 476). The determination of the first stage in the two-stage process calls for assessment of whether the provision (if any) made was inadequate for what, in all the circumstances,

was the proper level of maintenance etc. appropriate for the applicant having regard, amongst other things, to the applicant's financial position, the size and nature of the deceased's estate, the totality of the relationship between the applicant and the deceased and other persons who have legitimate claims upon his or her bounty.

The determination of the second stage, should it arise, involves similar considerations. Indeed, in the first stage of the process, the Court may need to arrive at an assessment of what is the proper level of maintenance and what is adequate provision, in which event, if it becomes necessary to embark upon the second stage of the process, that assessment will largely determine the order which should be made in favour of the applicant. In saying that, we are mindful that there may be some circumstances in which a Court could refuse to make an order notwithstanding that the applicant is found to have been left without adequate provision for proper maintenance. Take, for example, a case like *Ellis v. Leeder* ([1951] 82 CLR 645), where there were no assets from which an order could reasonably be made and making an order could disturb the testator's arrangements to pay creditors.

The nature of the two-stage inquiry

Although the precise nature of the jurisdictional question has been the subject of some debate, the correct view is that the question is strictly one of fact, notwithstanding that it involves the exercise of value judgments (*White v. Barron* [1980] 144 CLR at 441-443 per Mason J., 448-449 per Aickin J., 456-457 per Wilson J.; *Goodman v. Windeyer* [1980] 144 CLR at 509 per Aickin J.; *Hunter v. Hunter* [1987] 8 NSWLR 573 at 576 per Kirby P.) The evaluative character of the decision stems from the fact that the Court must determine whether the applicant has been left without **adequate** provision for his or her **proper** maintenance, education and advancement in life.

In *White v. Barron* ([1980] 144 CLR at 443) although Mason J held that the question does not involve the exercise of a discretion, his Honour observed:

> There is an element of the artificial in saying that it is only after jurisdiction is established that the exercise of discretion begins, for the twin tasks which face the primary Judge are similar.

In *Goodman v. Windeyer,* Gibbs J (with whom Stephen J and Mason J. agreed) expressly agreed with this comment and held that the nature of the inquiry is such that the Court is called upon to exercise a discretion. Gibbs J said ([1980] 144 CLR at 502):

> [T]he words 'adequate' and 'proper' are always relative. There are no fixed standards, and the Court is left to form opinions upon the basis of its own general knowledge and experience of current social conditions and standards.

It is clear from this passage that his Honour was conveying that the primary Judge was in essence making a value judgment in much the same way as a primary Judge makes a sound discretionary judgment in personal injury cases when he or she assesses the quantum of damages say for pain and suffering, and for loss of amenities of life.

Strictly speaking, however, the jurisdictional question, though it involves the making of value judgments, is a question of objective fact to be determined by the Judge at the date of hearing. This conclusion may have consequences in terms of what an appellant needs to demonstrate on appeal, an issue that will be considered shortly.

The decision made at the second stage, by contrast, does involve an exercise of discretion in the accepted sense (*White v. Barron* [1980] 144 CLR at 442 per Mason J, 449 per Aickin J., 455 per Wilson J; *Goodman v. Windeyer* [1980] 144 CLR at 501-502 per Gibbs J, 509 per

Aickin J). This is evident from the term "may" in s. 7, and this conclusion is not affected by the fact that this section, unlike s. 3 of the Testator's Family Maintenance and Guardianship of Infants Act 1916 (NSW), the predecessor to the present Act, does not contain an express reference to the Court's discretion to make an order for family provision. The fact that the Court has a discretion under s. 7 means that, as stated above, it may refuse to make an order even though the jurisdictional question has been answered in the applicant's favour (*Pontifical Society for the Propagation of the Faith v. Scale* [1962] 107 CLR 9 at 19 per Dixon CJ; *Hughes v. National Trustees, Executors and Agency Co. of Australasia Ltd.* [1979] 143 CLR at 149 per Gibbs J; *White v. Barron* [1980] 144 CLR at 442 per Mason J; *Re Fulop Deceased* [1987] 8 NSWLR 679 at 680 per McLelland J).

The task confronting the appellant on appeal

The principles of law which regulate the circumstances in which an appellate Court may review the exercise of a judicial discretion are not in doubt (*House v. The King* [1936] 55 CLR 499 at 504-505).

However, in the context of family provision cases, the principles governing the review of a decision on the jurisdictional question are not settled. In *Goodman v. Windeyer* ([1980] 144 CLR at 501), Gibbs J did not decide whether an appeal from a decision on the jurisdictional question should be governed by the principles that regulate appeals from decisions made in the exercise of a discretion. Similarly, in *Kearns v. Ellis* (Unreported, New South Wales Court of Appeal, 5 December 1984 at 8-9), Mahoney JA raised the issue but did not express a concluded view.

Kirby P, by contrast, had held that the principles that govern appellate review of discretionary decisions should apply (*Hunter v. Hunter* [1987] 8 NSWLR at 576; *Golosky v. Golosky* unreported, New South Wales Court of Appeal, 5 October 1993 at 15; *Singer v. Berghouse*, unreported, New South Wales Court of Appeal, 24 July 1992 at 12-13. See also *White v. Barron* (1980) 144 CLR at 435 per Barwick CJ). In our view, this is the correct approach. In this respect we should express our agreement with the following comments of his Honour in *Golosky v. Golosky* (Unreported, New South Wales Court of Appeal, 5 October 1993 at 13-14):

> Unless appellate Courts show restraint in disturbing the evaluative determinations of primary decision-makers they will inevitably invite appeals to a different evaluation which, objectively speaking, may be no better than the first. Second opinions in such cases would be bought at the cost of diminishing the finality of litigation in a troublesome area and, sometimes at least, with a burden of costs upon the estate which should not be encouraged.

Conclusion

Accordingly, Sheller JA was correct in dealing with the appeal to the Court of Appeal on the footing that it was necessary for the appellant to show that the Master made "an entirely erroneous estimate of what, in the circumstances, was an adequate provision for the [appellant's] proper maintenance, education and advancement in life".

As recent cases in this Court have made plain (See, e.g. *Mallet v. Mallet* [1984] 156 CLR 605 at 623 per Mason J. Deane J. concurring.), it is important that the Courts do not disregard or discount the nonfinancial contributions made to the property and finances of the parties to a marriage or marriage-like relationship, such as the contributions made by parties as homemakers and parents, which are not directly productive of a monetary return. In this case, however, the relationship was one between two people with comparable assets who, at a late stage of their lives, agreed to marry on the basis of a written agreement about their respective future interests in their existing and any subsequently acquired property. The

evidence is that, while the deceased and the appellant shared expenses when travelling the deceased paid their hotel and rental expenses for the period during which they resided in Sydney.

In these circumstances, and paying careful regard to the need to take due account in an appropriate case of contributions which are not directly productive of a monetary return, we do not think that the case is one in which the appellant has established that the Master's estimate was entirely erroneous. The Master said:

> There is nothing to suggest that she is not able to lead a perfectly satisfactory life comfortable in her own home with a secure income backed by a large capital sum. In many cases the need for maintenance is obvious without any particular expression of the need but in this case no need has been shown for anything now or likely to be required in the future which would not easily [be] covered by the [appellant's] own resources.

That was a conclusion which the Master was entitled to reach on the materials before him. For our part, we are content to rely on the reasons given by Sheller JA for holding that the appellant failed to show that the Master's estimate was wholly erroneous. In particular, we agree with the following comments by his Honour:

> The appellant argued that it was strange and unusual that the deceased made no provision whatever in his will for his wife to whom he had been happily married. I must say that I find it extraordinary that the appellant presented scant or no evidence as to her present income and outgoings or as to her intentions or needs for the future or as to what lump sum provision applying appropriate discount tables would be required to meet these claims or needs, if they existed. In my opinion, in the circumstances of this case, for the Court, in the absence of any such evidence, to make an order for the payment to the appellant of a lump sum is to do no more than act on speculation and, contrary to the prohibition contained in s. 9(2) of the Act, to alter the deceased's disposition of his property in the absence of proof that he has inadequately provided for the appellant.

Section 33(1) of the Act provides that the Court may order that the costs, charges and expenses of family provision proceedings be paid out of the estate or notional estate of the deceased in such manner as it thinks fit. However, nothing in the Act precludes this Court from making an order for costs against an unsuccessful applicant. Accordingly, the appeal must be dismissed with costs.

Toohey J:

This appeal is from an order of the Court of Appeal of New South Wales which dismissed an appeal by the present appellant from a decision of Master Windeyer refusing her claim for relief under the Family Provision Act 1982 (NSW) ("the Act").

The background

Lionel Singer ("the testator") and Bernice Singer ("the appellant") were married in New York on 7 April 1987. The testator was 66 years of the age at the time; the appellant was 57 years of age. It was a second marriage for both of them. The testator's first wife died in 1985. He was a barrister of the Supreme Court of New South Wales and, although in retirement at the time of his marriage to the appellant, he had returned to practice on a limited basis. He had one child, an adult son. The appellant was a widow at the time of her marriage to the testator. She had two adult children, a son and a daughter. She was living in Brooklyn, U.S.A when she met the testator.

After marriage they travelled together for a time and then came to Australia. The testator had a house at Rose Bay but it had been severely damaged by a storm and for a time they lived at the Cranbrook Hotel at Rose Bay, then in a rented property at Bondi Junction. They

took steps to find a house which they had in mind to buy as joint tenants. However the testator died, unexpectedly, on 9 March 1988, only eleven months after their marriage.

Before their marriage the testator prepared a deed in anticipation of marriage which he sent to the appellant. She took it to a lawyer who explained its terms to her. She signed it and sent it back. Later, after the marriage and when the parties were living in Sydney, the deed was re-executed in the presence of the testator's solicitor and friend, Maxwell Berghouse, who is the executor of his will and the respondent to these proceedings.

The deed recites that each of the parties desires, with the accord of the other party, that her or his present assets, or assets into which they may be converted, be for her or his own use or disposition and shall be "testamentarily held" for the benefit of their respective children or other members of their separate families. In consideration thereof each party covenants not to make any claim on those assets and will not impede the other from dealing with or disposing of those assets.

The will

The testator made a will on 31 July 1987. The will was drawn by the respondent. The testator left his estate to the respondent as executor, on trust for sale and to hold the proceeds upon trust to pay "all my just debts funeral and testamentary expenses and all duties."

The testator disposed of the balance in the following way:

1. To pay any balance, being property or the proceeds of property acquired up to the date of marriage, to his son Yossef Singer, commonly known as Joseph Singer.
2. To pay any balance, being property acquired after the date of marriage, to the appellant for life and thereafter to his son.
3. To pay any balance, being "real estate purchased by me after the date of my said marriage" to the appellant for life and thereafter to his son.

Clause 3 of the will directed the executor "to bind himself to the terms of a Deed of Ante Nuptial Settlement made on 9 March 1987" and declared that the testator had "no further interest in the ante nuptial estate of my dear wife."

The effect of the will was that the testator's entire estate passed to the son, Joseph. The estate, at the date of death, consisted of the house at Rose Bay, valued at $275,000 and other assets, mainly in the form of money in the bank and the proceeds of life insurance policies, amounting to $291.735. The gross estate was $566,735, with liabilities of $111,979, leaving a net estate $454,756. At the same time of Master Windeyer's order the Rose Bay house had an agreed value of $380,000 (subject to a mortgage of $30,000). The cash in hand had been reduced to $176,000, in part in the discharge of liabilities, though payments had been made to Joseph Singer to reimburse him for moneys spent in restoring the house. This does not take account of $8,400 which, in Master Windeyer's words, "seems to have been taken by the widow". The precise circumstances relating to this payment do not appear.

The application

The appellant applied, pursuant to s. 7 of the Act, for an order making provision out of the estate "for her maintenance, education and advancement in life". The application was refused by Master Windeyer. It should be said immediately that, while s. 9(3)(b) of the Act empowers the Court to take into consideration "the character and conduct of the eligible person before and after the death of the deceased person", there was no suggestion that anything in the character or conduct of the appellant operated to "disentitle" her from an

order under the Act, to use the language of some of the cases (See, for instance, *Hughes v. National Trustees, Executors and Agency co. of Australasia Ltd.* [1979] 143 CLR 134). By all accounts the marriage, though short-lived, was a happy one.

Attention should also be drawn to s. 9(2) of the Act which precludes the Court from making an order under s. 7 unless it is first satisfied that the provision (if any) made in favour of the eligible person is inadequate for the proper maintenance, education and advancement in life of that person. In the present case, by reason of the terms of the will and the assets of the deceased there was no provision at all made for the appellant in the testator's will. Subject to a finding of inadequate provision, it is possible to focus on s. 7 of the Act which empowers the Court to order such provision out of the estate "as, in the opinion of the Court, ought... to be made for the maintenance, education or advancement in life" of the person applying.

The appellant was in part-time employment before her marriage to the testator though in the late 1960s she had two strokes which disabled her from working from some years. She gave up employment on marriage. She returned to Brooklyn after the testator's death. She no longer works and the job she held previously does not exist. Master Windeyer accepted that her health was not good, adding: "I think it should be taken that she will not work in the future".

The Master assessed the appellant's position in the following way, converting American into Australian currency. The appellant owns a house in Brooklyn, worth about $230,000.It is divided into two apartments. She lives downstairs and her daughter upstairs. She receives rent from her daughter of $460 a month; the market rental is about $630 a month. She has $320,000 invested in bank deposits; two bear interest and one is a tax free investment which does not bear interest but which, the Master said, "is presumably increasing in value". She is entitled to a pension at age 62 of about $370 a month, increased to $460 a month at age 65.

Joseph Singer was 44 years of age at the time of Master Windeyer's order. He has had a somewhat intermittent work history and since his father's death has been working on the damaged Rose Bay house. He has no assets of any value other than a car. He is a salesman but earns very little. His wife is an actress who does part-time work and earns about $200 a week from odd jobs.

Master Windeyer decided that the testator had not "failed in a moral obligation to make proper provision for the maintenance and advancement of his wife, she being the person he was bound to consider first." There seem to be two considerations which led to that decision. The first is the ante nuptial agreement which the Master did not consider decisive but which he clearly accepted as reflecting the wishes of the parties. In particular, he thought that:

> the real relevance of the agreement is to show that the parties thought it fair at the time so that the plaintiff could not say that she had expectations of a more affluent life than she had led before marriage in the event of her husband's death.

The other factor, which is not so explicit in the Master's reasons, is the absence of evidence of expenses so that:

> There is nothing to suggest that she is not able to lead a perfectly satisfactory life comfortable in her own home with a secure income backed by a large capital sum.

The Court of Appeal

In the Court of Appeal Sheller JA, with whom Cripps JA concurred, saw the ante nuptial agreement as having no greater significance than that ascribed to it by Master Windeyer. In passing, it may be noted that, by reason of s. 31(2) of the Act, a release by a person of his or her rights under the Act is ineffective unless the Court has given its approval to the release. No such approval was given (or sought) in the present case. Reference should also be made to s. 32(2) whereby evidence of a statement made by deceased person is, subject to the section, "admissible as evidence of any fact stated therein of which direct oral evidence by the deceased person would, if he were able to give that evidence, be admissible".

In so far as Master Windeyer and Sheller JA attributed no greater significance to the terms of the ante nuptial agreement than to provide evidence of what the parties themselves saw as a fair at the time, no criticism can be made of their approach. But it is evidence of what the parties thought at the time. In particular, the untimely death of the testator was not anticipated; but what was anticipated was that they would buy a house together.

Sheller JA countered the appellant's argument that it was strange and unusual that the testator had made no provisions for his wife to whom he had been happily married, by saying:

> I must say that I find it extraordinary that the appellant presented scant or no evidence as to her present income and outgoings or as to her intentions or needs for the future or as to what lump sum provision, applying appropriate discount tables would be required to meet these claims or needs, if they existed.

Sheller JA concluded his judgment by saying: "I am not persuaded that the Master erred in the exercise of his discretion". It is apparent from his Honour's conclusion and other references in his judgment that he placed heavy emphasis on what he saw as the discretionary nature of the task which the Master had to perform. In doing so, his Honour was, in my respectful view, in error.

The exercise of a discretion?

Before this Court Counsel for the respondent also took his stand to a considerable extent on the 'discretion" vested in Master Windeyer. That submission invites consideration of what is the discretion which exists, if it exists at all, in the Court dealing with an application under the Act.

Section 7 of the Act empowers the Court to order such provision out of the estate of a deceased person as, in the opinion of the Court, ought to be made having regard to the circumstances at the time the order is made. Certainly, the decision that provisions ought to be made involves the making of a value judgment in the light of the evidence. But that is not to say that the Court has a discretion to refuse relief if that judgment leads to the conclusion that provision ought to be made. Part of the difficulty which affects this area of the law lies in the use of "discretion", in relation to both the making of an order and the terms of the order to be made.

Mason J. approached the matter in *White v. Barron* in the following way([1980] 144 CLR 431 at 441.):

> The question whether the testator left the appellant widow 'without adequate provision' for her 'proper maintenance' was to be determined by the primary Judge by reference to circumstances as they existed at the date of the testator's death. Once this question was answered in the affirmative, it was for the Court to exercise its discretion to order adequate provision for proper maintenance for the appellant by reference to circumstances as they existed at the date of the order.

When reference is made to earlier decisions of this Court to support the discretionary nature of orders made for provision out of the estate of a deceased person, it should be remembered that, at the time, the Court to which application was made was expressly empowered "at its discretion" to make an order. Decisions such as *Coates v. National Trustees Executors and Agency Co. Ltd.*([1956] 95 CLR 494.), *McCosker v. McCosker*([1957] 97 CLR 566.), *Pontifical Society for the Propagation of the Faith v. Scales*([1962] 107 CLR 9.), as well as *White v. Barron*, must be read in this light. Even so, Dixon CJ suggested in *Scales*([1962] 107 CLR at 19.): "Perhaps this Court and other Courts of Appeal have attached too much significance to the discretionary aspects of orders under appeal". At least so far as s. 7 of the Act is concerned, the Court is empowered to order that such provision be made out of the estate "as, in the opinion of the Court, ought,... to be made for the maintenance, education or advancement in life" of an eligible person. If the Court is of that opinion, it is hard to see on what footing the Court may decline to order some provision. (However, it may be that the assets of the deceased are such that no effective order can be made: *Ellis v. Leeder* [1951] 82 CLR 645). Of course, in reaching that opinion the Court must have regard to all the considerations which the Act makes relevant, in particular those in s. 9(3). But even then the discretionary nature of this step should not be overstated. The task of the Court is to give effect to its opinion that some provision ought to be made.

Indeed s. 9 points the way in which the Court is to exercise its jurisdiction under the Act. In the case of an "eligible person" who qualifies as such only because he or she is a former spouse or a dependent grandchild or a dependent member of the deceased's household, the Court must first determine whether there are factors which warrant the making of the application (s. 9(1)). By clear implication, that initial inquiry is not required in the case of a widow or widower. But the Court is enjoined against making an order under s. 7 unless it is satisfied that the provision (if any) made for the eligible person is, at the time the matter is before the Court, inadequate for the proper maintenance, education and advancement in life of the eligible person (s. 9(2)). Finally, the Court is empowered, in determining whether any provision should be made, to take into consideration such factors as any contribution made by the eligible person to the property or welfare of the deceased, and the character and conduct of the eligible person (s. 9(3)).

The structure and contents of the Act do not point to the exercise of a merely discretionary judgment by the Court. Rather, they require the Court to conduct the inquiry which the various provision identify. That is, the Court must first be satisfied that the provision (if any) may by the deceased is inadequate for the proper maintenance, education and advancement in life of the eligible person. If it then appears that the deceased has not made adequate provision for the eligible person, the Court is empowered to make an order in favour of that person. The terms of the order it makes is not so much the exercise of a discretion as an assessment of what is required, in all the circumstances, to make that provision which ought to be made. If that approach is not strictly in conformity with the approach taken in the cases to which reference has been made earlier in this judgment, the explanation lies in the language chosen by the legislature in each instance.

It is clear that the majority in the Court of Appeal were influenced by what they regarded as the discretionary nature of the judgment below, coupled with the absence of detailed evidence as to the appellant's "intentions or needs for the future".

Kirby P. would have allowed the appeal. His Honour accepted that the testator's will must be considered against the "background of an uncontested moral obligation to his son". Nevertheless he was clearly influenced by the fact that if Master Windeyer's orders stand, "Mr. Joseph Singer receives the entirety of these assets; the appellant receives nothing".

In dealing with the appellant's own financial position, it is true, as the respondent said, that Kirby P. made errors. One is of importance. His Honour said that the appellant "also held jointly with [her] daughter a deposit of about $US150,000 in financial institutions". In fact, as already noted, the amount is $A320,000 and is not shared with her daughter. His Honour also said that the appellant was not eligible for a pension until she reached 65. Again, as noted earlier, she was entitled to a pension at 62, increasing when she reached 65. The conclusion reached by Kirby P.: "She was therefore obliged to live on her capital" must be read in the light of these circumstances. Nevertheless, the reason why Kirby P. would have allowed the appeal is more fundamental and his Honour's ultimate conclusion that some provision should be made is not fatally flawed by these considerations.

The policy underlying comparable legislation has been stated by this Court and other Courts on many occasions. Inevitably, particularly in the older decisions, emphasis has been placed on the obligations of a testator as husband and father. Necessarily, those statements must now accommodate the changing position of parties to a marriage or *de facto* relationship, including the heightened earning capacity of women. Nevertheless, the observations of Salmond J in *In re Allen, deceased; Allen v. Manchester* ([1922] 41 NZLR 218 at 220.), which have been referred to so often by this Court and other Courts, have not lost their force (See *Bosch v. Perpetual Trustee Co. Ltd* [1938] AC 463 at 479; *Goodman v. Windeyer* [1980] 144 CLR 490 at 497.).

> The Act is... designed to enforce the moral obligation of a testator to use his testamentary powers for the purpose of making proper and adequate provision after his death for the support of his wife and children, having regard to his means, to the means and deserts of the several claimants, and to the relative urgency of the various moral claims upon his bounty.

Kirby P., in effect, asked rhetorically: How could it be said that a testator who was able to make provision but made no provision at all for his wife had met the obligation which the Act imposes? This Court may ask the same question, adding: particularly when some provision could well have been made for the testator's wife without affecting his obligation to make provision for his son.

As things stood at the time of Master Windeyer's order, Joseph Singer was to receive the house at Rose Bay, worth $380,000 or thereabouts (subject to a mortgage), and disposable assets of about $176,000. Mr Singer swore an affidavit in connection with the appellant's application to which he exhibited a medical certificate referring to a "nervous disorder". But the certificate was issued on 8 July 1983 and its purpose was to explain the impact on him of unsuccessful litigation in which he was involved relating to a partnership business. Notwithstanding his intermittent work history, nothing was said in the affidavit to indicate that Mr Singer is unable to work. Much of his time in recent years has been spent in restoring the house in Rose Bay and thereby of course enhancing its value to him.

In those circumstances the proper conclusion is that the gift of the Rose Bay house constituted adequate provision by the testator for his adult son and that provision for his widow should be made from the disposable assets.

While it is undoubtedly true that the Supreme Court would have been assisted by more specific evidence from the appellant as to her financial position, her application under the Act did not stand to be determined on a current needs basis. Indeed, Sheller JA said: "The appellant's claim was said expressly by her Counsel not to be based on any present need." The gravamen of the appellant's complaint does not lie in her needs at the time of the testator's death; rather, it asserts a failure by the testator to make proper and adequate provision for her in all the circumstances.

The appellant was younger than the testator by some eight years. She had a greater life expectancy. She has no job and, by reason of her age and indifferent health, no real prospect of employment. She has suffered the dislocation, financial and otherwise, of moving to Australia and returning to the United States. In all the circumstances there was no adequate provision made for the appellant by the testator. And in all the circumstances it seems to me inevitable that, in terms of s. 7 of the Act, some provision ought to have been made by the Court for her maintenance and advancement in life.

Since this matter has been before the Courts on four occasions (including the application for special leave to appeal), it is imperative that no more of the estate be consumed in legal costs than is absolutely unavoidable. It is therefore desirable that this Court dispose of the matter. An amount of $50,000 is reasonable provision for the appellant in all the circumstances, without however requiring her to account for the $8,4000 she has received. I would order provision for the appellant to this effect.

The appeal should be allowed. The parties should be given an opportunity to file written submissions on the question of costs.

Gaudron J:

Bernice Singer, the appellant, married Lionel Singer in the United States of America in 1987. Their personal and financial circumstances were very similar. They were both of mature years: she was 57 and he was 66. Both had been married before. Mrs Singer was a widow with two adult children, Mr Singer a widower with an adult son. They each had a home of their own and their assets were of much the same value, his mainly in Australia and hers in the United States. Both earned or were in a position to earn income from their personal exertions: Mrs Singer had permanent part-time employment with the City of New York; Mr Singer was a qualified rabbi and, as well, had recently resumed practice as a barrister of the Supreme Court of New South Wales.

The position changed somewhat after the marriage. Mr Singer returned to Australia where he was able to practice as a barrister and, as well, discharge his duties as a rabbi. Mrs Singer, on the other hand, gave up her employment to be with and look after her husband. After arrival in Australia, they spent some time looking for a house or other residential accommodation which, it seems, was to be bought in joint names with money provided by Mr Singer. Mr Singer died unexpectedly before any purchase was made.

The relevant provisions of Mr Singer's will are set out in other judgments. It is sufficient to note that the will contained provision for property acquired after the marriage to go to Mrs Singer for life and thereafter to Mr Singer's son, Yossef, who is also known as Joseph. No property was acquired after the marriage and Mrs Singer took nothing under the will. Instead, the entire estate, the net value of which at the date of death was $454,756, passed to the son.

Probate of Mr Singer's will was granted to the respondent, Maxwell Berghouse, and in due course Mrs Singer applied under s. 7 of the Family Provision Act 1982 (N.S.W.) ("the Act") for provision out of the estate for her "maintenance, education or advancement in life".

The application, which was heard by Master Windeyer (as he then was), was dismissed. In the course of his ruling, the Master noted the circumstances of the marriage between Mr and Mrs Singer, their life together and the personal and financial circumstances to which I have earlier referred and the details of which are set out in other judgments. He found that Mrs Singer's job with the City of New York no longer existed, that her health was not good and that she would not work in the future. He also noted the terms of an agreement, which

has been referred to as an ante-nuptial settlement, and the somewhat precarious financial circumstances of Mr Singer's son. Again, the relevant terms of the ante-nuptial settlement and the details of the sons's circumstances are set out in other judgments and need not be repeated. The Master also noted that Mrs Singer "ha[d] given no evidence of expenses other than some rough figures for the outgoings on the property but [that] she ha[d] a large capital sum from which to receive income". He found that there was nothing to suggest that Mrs Singer "is not able to lead a perfectly satisfactory life comfortable in her own home with a secure income backed by a large capital sum" and added that "no need ha[d] been shown for anything now or likely to be required in the future which would not easily [be] covered by [her] own resources".

The Master's decision dismissing Mrs Singer's application was based on the consideration that "recent cases such as *Re Fulop* ([1987] 8 NSWLR 679.) and *Hunter v. Hunter* ([1987] 8 NSWLR 573.) make it quite clear that the provisions of the will are only to be interfered with when the [Act] requires that to be done". It is apparent from the Master's earlier finding as to Mrs Singer's needs and resources that he considered that, at least in a case where no provision was made by the deceased person, the Act only required such interference if it were shown that an applicant had needs or requirements that could not be met from his or her own resources.

Mrs Singer appealed unsuccessfully to the Court of Appeal. It was held by majority (Sheller and Cripps JJ.A., Kirby P. dissenting) that it had not been shown that "the Master erred in the exercise of his discretion". As will later appear, I do not think it is strictly accurate to describe the power conferred by s. 7 as a discretion, notwithstanding the fact that it is phrased in terms of what the Court **may** do. But no matter how the power is described, an analysis of the relevant provisions of the Act discloses, in my view, that there is an error apparent in the Master's decision and another, arguably more significant, implicit in his approach.

Section 7 of the Act confers power on the Supreme Court of New South Wales to make an order for provision out of the estate of a deceased person in the following terms:

> Subject to s. 9, on an application in relation to a deceased person in respect of whom administration has been granted, being an application made by or on behalf of a person in whose favour an order for provision out of the estate or notional estate of the deceased person has not previously been made, if the Court is satisfied that the person is an eligible person, it may order that such provision be made out of the estate or notional estate, or both, of the deceased person as, in the opinion of the Court, ought, having regard to the circumstances at the time the order is made, to be made for the maintenance, education or advancement in life of the eligible person.

Section 9 provides, amongst other things, as to whether an order can be made and whether an order should be made. There is special provision, in s. 9(1), in the case of an application "by an eligible person who is such a person by reason only of paragraph (c) or (d) of the definition of 'eligible person' " in s. 6 of the Act (Par. (c) relates to former spouses of the deceased, while par. (d) concerns grandchildren and some time dependents and members of the household of the deceased.), but that is of no relevance in this case (s. 9(1) provides that in such a situation "the Court shall first determine whether, in its opinion, having regard to all the circumstances of the case (whether past or present), there are factors which warrant the making of an application and shall refuse to proceed with the determination of the application and to make the order unless it is satisfied that there are those factors"). Mrs Singer is an eligible person by reason of par. (1) (i) of that definition, being a person who "was the wife...of the deceased person at the time of [his] death".

Putting s. 9 (1) to one side, the question whether an order can be made under s. 7 is governed by s. 9 (2) which relevantly provides:

> The Court shall not make an order under s. 7... in favour of an eligible person out of the estate or notional estate of a deceased person unless it is satisfied that:
>
> (a) the provision (if any) made in favour of the eligible person by the deceased person either during his lifetime or out of his estate;
>
> ...
>
> is, at the time the Court is determining whether or not to make such an order, inadequate for the proper maintenance, education and advancement in life of the eligible person.

The questions whether and, if so, what order should be made are governed by s. 9(3) and (4) which provide:

> (3) In determining what provision (if any) ought to be made in favour of an eligible person out of the estate or notional estate of a deceased person, the Court may take into consideration:
>
> (a) any contribution made by the eligible person, whether of a financial nature or not and whether by way of providing services of any kind or in any other manner, being a contribution directly or indirectly to:
>
> (i) the acquisition, conservation or improvement of property of the deceased person; or
>
> (ii) the welfare of the deceased person, including a contribution as a homemaker;
>
> (b) the character and conduct of the eligible person before and after the death of the deceased person;
>
> (c) circumstances existing before and after the death of the deceased person; and
>
> (d) any other matter which it considers relevant in the circumstances:
>
> (4) Nothing in subsection (3) (a) limits the generality of subsection (3) (b), (c) and (d) and the Court may consider a contribution of the same nature as that referred to in subsection 3(a) or of a different nature in so far as it considers it relevant under subsection 3(b), (c) or (d).

The question under s. 9 (2) (a) in whether "the provision (if any) made ... by the deceased person ... is... inadequate". That is different from the question whether adequate provision has been made. If the latter were the question posed by s. 9 (2) (a), the fact that provision had not been made might well lead to the conclusion that it was not adequate. But that is not the case when the question is whether the provision (if any) is inadequate. That is a question that can and must be answered regardless of whether provision has been made. And as earlier indicated, the answer to that question determines whether or not an order can be made under s. 7.

The preliminary question under s. 9 (2) (a) and the first question directed by s. 9 (3), namely, whether provision ought to be made, involve considerable subjective assessment and may be said to call for the making of a value judgment (See with respect to the "value judgment" required under s. 3 of the Testator's Family Maintenance and Guardianship of Infants Act 1916 (NSW), the predecessor to the Act, *White v. Barron* [1980] 144 CLR 431 at 434-435 per Barwick CJ, 449 per Aickin J and *Goodman v. Windeyer* [1980] 144 CLR 490 at 509 per Aickin J). Unless both questions are determined in favour of an applicant, there is no power under s. 7 to make an order for provision out of the estate or notional estate but, assuming no issue arises under s. 9 (1), if both are determined in favour of the applicant, such an order

must be made. This follows from the discretion in s. 9 (2) (a) that "[t]he Court shall not make an order...unless it is satisfied that the provision (if any) made...by the [testator]...is inadequate", the opening words of s. 7, namely, "[s]ubject to s. 9", and the incongruity that would be involved if s. 7 were to be construed as allowing the Court to make or refuse to make an order for provision contrary to the opinion formed in accordance with s. 9(3). The same considerations lead to the conclusion that, once a decision has been made under s. 9(3) as to what provision ought to be made, that is the provision that must be made under s. 7. Thus, putting s. 9(1) to one side, a decision under s. 7 is not a discretionary decision in the usual sense of a discretion whether or not to make an order at all. Rather, a decision under s. 7 is one that is dictated by the subjective assessments or value judgments required by s. 9(2)(a) and (3). However, where a subjective assessment or value judgment is concerned, appellate review depends on essentially the same considerations as those which apply in cases involving the exercise of a discretion (*Hunter v. Hunter* [1987] 8 NSWLR at 576 per Kirby P. See generally, *O'Sullivan v. Farrer* [1989] 168 CLR 210 at 216 per Mason CJ, Brennan, Dawson and Gaudron JJ and the cases referred to therein).

As earlier indicated, the Master disposed of the application by asking whether the Act required "the provisions of the will...to be interfered with". That was a proper approach in so far as the Act required the making of an order for provision if the issue under s. 9(2)(a) and (3) were to be determined in favour of Mrs Singer and required that no order be made if either issue were to be determined against her. But at no stage did the Master expressly ask or answer either the question directed by s. 9(2)(A) or that directed by s. 9(3).

Although the questions under s. 9(2)(a) and (3) are distinct, there is no necessity that they be decided separately from each other or from the ultimate question to be determined under s. 7. It is thus possible that the Master determined all questions compendiously by determining that the Act did not require an order to be made. It is also possible that he simply determined the question raised by s. 9(2). The Court of Appeal appears to have approached the case on the basis that the decision was based on that sub-section, the issue being identified in the judgment of Sheller JA (with which Cripps JA agreed) as the making of "an order...[based] on speculation and, contrary to the prohibition contained in s. 9(2) of the Act". I shall assume, although it is far from clear, that the Master was addressing that question and that, in so doing, he made an independent assessment or value judgment.

It is well settled that the preliminary question which arises under testators' family maintenance legislation, namely, whether the provision (if any) is inadequate, is to be determined in the light of all the circumstances of the case (*Bosch v. Perpetual Trustees Co.* [1938] AC 463 at 476). It follows, at least as a matter of law, that the issue goes beyond the question whether the applicant has needs and requirements that cannot be met from his or her own resources. Conversely, if an applicant does establish needs and requirements of that kind, he or she will have gone a very long way towards satisfying and, as a general rule, will satisfy the requirement in s. 9(2)(a) of the Act. That was the point of *Hunter v. Hunter* to which the Master referred in his decision.

There may be cases where, given the circumstances and the size of the estate, an applicant will, in practical terms, only succeed by proving needs and requirements that cannot be satisfied from his or her own resources. But that is a practical consideration only. And it will not even be a practical consideration in a case where the estate is sufficient to meet the moral claims of all members of the family.

This is not a case of a small estate and competing moral claims. It is clear that Mr Singer's estate was sufficient to provide for Mrs Singer and, as well, to satisfy any moral claim of his

son. There was, thus, no practical necessity for Mrs Singer to establish needs and requirements which could not be met from her own resources. Nor, as I have indicated, was there a legal requirement for her to do so. The Master's decision proceeded on the basis that, either as a matter of practical necessity or as a matter of law, Mrs Singer had to demonstrate some need of that kind and, to that extent, it is apparent that the decision was reached without having proper regard to all the circumstances of the case. That was an error which should have been recognized and dealt with by the Court of Appeal.

It is also well established that the preliminary question that arises under testators' family maintenance legislation, namely whether the provision is inadequate, is similar to, or "may come... very close to" the question as to what provision ought to be made (*White v. Barron* [1980] 144 CLR at 449 per Aickin J, speaking in relation to the questions that arose under the Testator's Family Maintenance and Guardianship of Infants Act. See also *Goodman v. Windeyer* [1980] 144 CLR at 509 per Aickin J). To put the matter in the context of s. 9, the question that arises under s. 9(2)(a) is not wholly distinct from that which arises under s. 9(3). And the matters to which regard may be had under s. 9 (3) are, or usually will be, circumstances to be taken into account on the preliminary question under s. 9(2) (a).

One matter to which regard may be had under s. 9(3) is the "contribution [by the applicant]... whether of a financial nature or not... being a contribution directly or indirectly to ... the welfare of the deceased person" (See s.9(3)(a)(ii)). Mrs Singer made a most significant contribution - one might even say sacrifice - to the welfare of her husband. She gave up her employment with the City of New York to be with and look after him. It may be that that contribution is not strictly a financial contribution, but it is one which, to a very large extent, can be measured in money terms.

The tendency of the Courts to overlook or undervalue women's work, whether in the home or in the paid work force, has often been remarked upon (See, for example, Scutt & Graham, **For Richer For Poorer; Money, Marriage and Property Rights,** [1984], especially Ch.3; Scutt, **Women and the Law,** [1990], ch.3; Graycar and Morgan, **The Hidden Gender of Law**, [1990], Ch.5; Warning, **Counting for Nothing: What Men Value and What Women are Worth**, [1988]. And see also Australian Law Reform Commission, Report No.69, Pt 1, **Equality Before the Law: Justice for Women,** [1994] at 11-13). To my mind, that is what is involved in the failure to acknowledge the significant contribution involved when a wife gives up paid employment to be with and look after her husband. To put the present matter in terms appropriate to appellate review, the failure to acknowledge that by giving up her paid employment Mrs Singer made a significant contribution to her husband's welfare amounted to a failure to have regard to a relevant circumstance - indeed, a very relevant circumstance. For that reason, as well as for the error apparent in the Master's decision, Mrs Singer's appeal to the Court of Appeal should have been allowed. Similarly, her appeal to this Court should be allowed.

My view is a minority view and it is, thus, unnecessary for me to consider the issues which would fall for determination if the Master's decision were set aside. I should, however, note that I agree with the view that the ante-nuptial settlement was a matter properly taken into account for the limited purposes identified by Sheller JA. In particular, it was relevant to show that Mrs. Singer "could not say that she had expectations of a more affluent life than she had led before (the) marriage". Equally, however, there was nothing in the circumstances of the case to suggest that she expected or should have expected a less affluent one. But that is what she has: she no longer has employment and, as the Master found, she will not work in the future.

Mrs Singer was only employed by the City of New York for a short time and, given her health and age, it may be that she would not have stayed in employment for very long. But the fact is that she is now worse off than she was when she married Mr Singer and, in a real sense, worse off because she married him. That warrants a finding that Mrs Singer was not adequately provided for and, also, the making of an order in her favour under s. 7 of the Act.